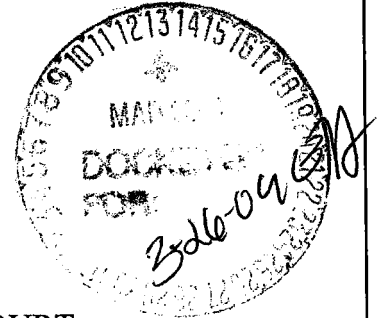


Exhibit “A”

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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**
9

10 Sherryl L. Madison,

No. 08-CV-1562-PHX-GMS

11 Plaintiff,

ORDER

12 v.

13 First Magnus Financial Corporation;
14 Lehman Brothers Holdings, Inc.; GMAC
Mortgage, LLC; Transnational Financial
15 Network, Inc.; Fremont Investment &
Loan Company; Homecomings Financial
16 Network, LLC; Indy Mac Bank, FSB; US
Bank National Association; Fidelity
17 National Foreclosure Solutions; AMC
Mortgage Services, Inc.; Unified Capital
18 Group, Inc.; Community Lending Service,
Inc.; Argent Mortgage Company, LLC;
19 Litton Loans; HomeEq Servicing Inc.;
Washington Mutual Bank; and Mortgage
20 Electronic Systems, Inc.,

21 Defendants.
22

23 Pending before the Court is the Motion to Dismiss of Defendant Indymac Bank, FSB
24 ("IndyMac"). (Dkt. # 90.) For the reasons set forth below, the Court grants Defendant's
25 motion and dismisses Defendant Indymac from this action.

26 ///

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28 ///

BACKGROUND

Plaintiff Sherryl Madison is an Arizona resident who allegedly owns real property in Arizona at the following addresses: (1) 24220 N. 53rd Avenue, Glendale, Arizona 85310; (2) 522 E. Glendale Avenue, Phoenix, Arizona 85020; (3) 2302 E. Lincoln Drive, Phoenix, Arizona 85016; (4) 16083 West Morning Glory Street, Goodyear, Arizona 85338; (5) 18607 N. 45th Drive, Glendale, Arizona, 85308; and (6) 7384 W. Utopia Road, Glendale, Arizona 85308. In her First Amended Complaint, Plaintiff alleges that, “[b]etween December 15, 2003 and July 2006, [she] refinanced and/or purchased [those properties].” (Dkt. # 81 ¶ 14.) Plaintiff allegedly obtained financing related to the various properties in the amounts of \$428,000.00, \$176,000.00, \$440,800.00, \$750,000.00, \$261,250.00, \$492,000.00, \$637,000.00, and \$975,000.00 from various financial institutions. The financing was obtained pursuant to promissory notes secured by deeds of trust on each property. Apparently, non-judicial trustee sales have or are being pursued in respect to all six of Plaintiff’s properties due to Plaintiff’s default on her promissory notes.

Defendant IndyMac is a financial institution that allegedly was or is involved in some manner with either the purchase, refinance, and/or the trustee sales of one or more of Plaintiff’s properties. On July 11, 2008, the Office of Thrift Supervision closed Defendant IndyMac due to concerns over its financial viability. Consequently, substantially all of IndyMac’s assets were transferred to a new institution – IndyMac Federal Bank. The Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation (“FDIC”) conservator of IndyMac Federal Bank.

In her First Amended Complaint (“FAC”), Plaintiff attempts to assert twenty-two causes of action, nine claims for relief, and a claim entitled “Compelling Partition” against all entities named as defendants, including Defendant IndyMac. (*See id.* ¶¶ 36-205.) Among the claims in the FAC are allegations that Defendant IndyMac violated various provisions of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and the Home Ownership Equity Protection Act, 15 U.S.C. § 1639 *et seq.* Although it appears

1 clear that not all Defendants are associated with each of Plaintiff's properties, (*see id.* ¶¶ 26),
 2 Plaintiff has nevertheless alleged that each of the defendants undertook the same wrongful
 3 conduct with respect to each of the six properties and with respect to all twenty-two causes
 4 of action and nine claims for relief.

5 On August 25, 2008, nearly two months after the closure of Defendant IndyMac,
 6 Plaintiff filed her first complaint in this action. (Dkt. # 1.) Plaintiff filed her FAC on
 7 November 20, 2008, seeking rescission of the promissory notes executed in connection with
 8 the six properties and seeking damages from all Defendants jointly and severally. (Dkt. #
 9 81 at 62.) On December 8, 2008, Defendant IndyMac Bank moved pursuant to the Financial
 10 Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821(d)(12)
 11 ("FIRREA"), to dismiss the FAC on grounds that the district court lacks jurisdiction over
 12 claims against failed banks where the administrative claims procedures enacted by FIRREA
 13 have not been exhausted.¹

14 DISCUSSION

15 I. Federal Rule of Civil Procedure 12(b)(1)

16 Federal courts are courts of limited jurisdiction and federal subject matter jurisdiction
 17 must exist at the time an action is commenced. *See Morongo Band of Mission Indians v. Cal.*
 18 *State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Because of its import, lack
 19 of subject matter jurisdiction may be raised at any time by any party or by the court. *See Fed.*
 20 *R. Civ. P. 12(h); Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594-95
 21 (9th Cir. 1996). "A party invoking the federal court's jurisdiction has the burden of proving
 22 the actual existence of subject matter jurisdiction." *Thompson v. McCombe*, 99 F.3d 352,
 23 353 (9th Cir. 1996). "If the court determines at any time that it lacks subject-matter
 24 jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

25
 26 ¹Defendant IndyMac alternatively argues for dismissal pursuant to Federal Rule of
 27 Civil Procedure 12(b)(6). However, because subject matter jurisdiction is presently lacking
 28 with respect to Defendant IndyMac, the Court declines to reach the merits of Defendant's
 12(b)(6) arguments.

1 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone*
 2 *v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see Thornhill Publ’g Co. v. Gen. Tel. &*
 3 *Elects.*, 594 F.2d 730, 733 (9th Cir. 1979). “In a facial attack, the challenger asserts that the
 4 allegations contained in the complaint are insufficient on their face to invoke federal
 5 jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the
 6 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for*
 7 *Everyone*, 373 F.3d at 1039. Given the nature of a facial attack, a court is required to accept
 8 the allegations in the complaint as true and view them in the light most favorable to the
 9 plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1988); *see also Warren v. Fox*
 10 *Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). A court, however, need not
 11 “assume the truth of legal conclusions merely because they are cast in the form of factual
 12 allegations.” *Id.* (quotation omitted).

13 II. Analysis

14 Defendant IndyMac Bank argues that “the Court does not have subject matter
 15 jurisdiction over Plaintiff’s claims against IndyMac[] because Plaintiff has not exhausted her
 16 administrative remedies against IndyMac pursuant to [FIRREA].” (Dkt. # 117 at 2.) 12
 17 U.S.C. § 1821(d)(13)(D) provides:

18 Except as otherwise provided in this subsection, no courts shall
 19 have jurisdiction over—

- 20 (i) any claim or action for payment from, or any action seeking
 21 a determination of rights with respect to, the assets of any
 22 depository institution for which the Corporation has been
 appointed receiver, including assets which the Corporation may
 acquire from itself as such receiver; or
 (ii) any claim relating to any act or omission of such institution
 or the Corporation as receiver.

23 “Jurisdiction over claims covered by section 1821(d)(13)(D) is ‘otherwise provided’ in §
 24 1821 only after completion of the claims procedures outlined in §§ 1821(d)(6)(A) and
 25 (d)(8)(C).” *Feise v. Resolution Trust Corp.*, 815 F. Supp. 344, 346 (E.D. Cal. 1993) (“The
 26 language ‘except as otherwise provided’ indicates that Congress expressly withdrew
 27 jurisdiction from courts over any claim to a failed institution’s assets made outside the
 28 statutory claims procedure.”); *see also McCarthy v. F.D.I.C.*, 348 F.3d 1075, 1078 (9th Cir.

2003) (“The phrase ‘except as otherwise provided in this subsection’ refers to a provision that allows jurisdiction after the administrative claims process has been completed.”).

The effect of these provisions, read together, is to require anyone bringing a claim against or seeking a determination of rights with respect to the assets of a failed bank held by the FDIC as receiver to first exhaust administrative remedies by filing an administrative claim under the FDIC’s administrative claims process. As the First Circuit explained, “FIRREA makes participation in administrative claims review process mandatory for all parties asserting claims against failed institutions,” and “where a claimant has . . . failed to initiate an administrative claim within the filing period, the claimant necessarily forfeits any right to pursue a claim against the failed institution’s assets in any court.” *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1151-52 (1st Cir. 1992) (citation omitted). Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies.

Freeman v. F.D.I.C., 56 F.3d 1394, 1400 (9th Cir. 1995) (quotation omitted).

Here, neither party argues that Plaintiff’s complaint is not a claim against the assets of a depository institution for which the FDIC is now acting as conservator. *See Lloyd v. F.D.I.C.*, 22 F.3d 335, 337 (1st Cir. 1994) (holding that a suit by a debtor seeking equitable reformation or cancellation of a mortgage agreement is a “determination of rights with respect to [] the assets” subject to § 1821(d)(13)(D)). Although Plaintiff does not dispute the applicability of § 1821(d)(13)(D), Plaintiff appears to argue that she is immune from the jurisdictional requirements of FIRREA because: (1) “the dispute started before the bank’s failed status was reported” and (2) both federal question and diversity jurisdiction exist. (Dkt. # 111 at 1, 3.)

The Ninth Circuit has held that administrative process exhaustion is required under FIRREA before a district court retains jurisdiction over claims against a failed bank for which the FDIC is acting as receiver, regardless of whether an action is commenced before or after the FDIC is appointed. *Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1282 (9th Cir. 1994). Therefore, to the extent that Plaintiff argues immunity from § 1821(d)(13)(D) based on the fact that her dispute with Defendant IndyMac began prior to the bank’s failure, the argument has no merit. Notably, despite the allegations that the dispute existed prior to this suit’s commencement, the current action was commenced nearly two

1 months *after* Defendant IndyMac failed. Consequently, Plaintiff's argument is not relevant
2 to whether § 1821(d)(13)(D) applies to her claims against Defendant IndyMac.

3 Likewise, Plaintiff's second argument – that jurisdiction exists independent of §
4 1821(d)(13)(D) based on diversity and based on her assertion of a federal claim – has no
5 merit. The Ninth Circuit's interpretation of FIRREA makes clear that § 1821(d)(13)(D)
6 imposes statutory limitations on a court's jurisdiction regardless of whether a traditional
7 jurisdictional basis exists. *See Intercontinental*, 45 F.3d at 1282 (holding that the district
8 court lacks jurisdiction to consider claims against a failed financial institution unless they are
9 brought before the FDIC); *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir.
10 1993) ("Section 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the
11 administrative procedures of section 1821 . . .").

12 Therefore, Plaintiff cannot advance claims against Defendant IndyMac in this Court
13 until the administrative procedures of § 1821 have been fully exhausted. Pursuant to Federal
14 Rule of Civil Procedure 12(b)(1), Plaintiff has the burden to show "affirmatively and
15 distinctly, the existence of whatever is essential to federal jurisdiction," either by pleading
16 those facts or by extrinsic evidence. *Smith v. McCullough*, 270 U.S. 456, 459 (1926). As
17 Plaintiff has failed to present any extrinsic evidence on the matter, the Court has examined
18 Plaintiff's FAC and concludes that Plaintiff has failed to sufficiently allege the exhaustion
19 of administrative process under FIRREA sufficient to permit jurisdiction over the matter.

20 CONCLUSION

21 Because Plaintiff failed to sufficiently plead or otherwise demonstrate exhaustion of
22 the administrative procedure required under FIRREA, this Court does not presently have
23 jurisdiction over Plaintiff's claims asserted against Defendant IndyMac.

24 **IT IS THEREFORE ORDERED** that the Motion to Dismiss Defendant IndyMac
25 Bank (Dkt. # 90) is **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(1).

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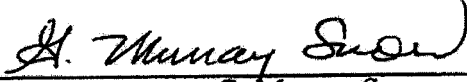
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1 **IT IS FURTHER ORDERED** directing the Clerk of the Court to dismiss Defendant
2 IndyMac Bank, FSB from this action.

3 DATED this 12th day of March, 2009.

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G. Murray Snow
United States District Judge

Exhibit “B”

When recorded mail to:

Name: _____

Address: _____

City/State/Zip: _____

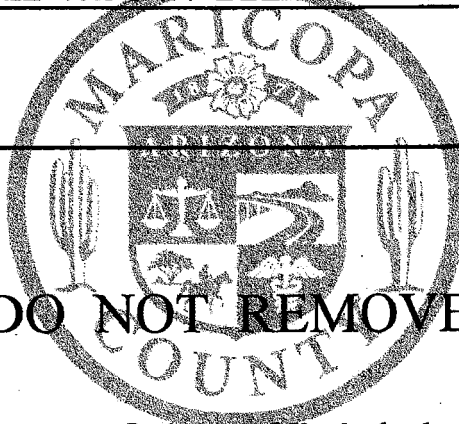


OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2009-0389815 05/01/09 10:20 AM
3 OF 8

FONTEBH

this area reserved for county recorder

CAPTION HEADING:



This is part of the official document.

Case 2:08-cv-01562-GMS Document 5 Filed 08/25/2008 Page 1 of 2

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AUG 25 2008	
CLERK U.S. DISTRICT COURT	
DISTRICT OF ARIZONA	
BY	DEPUTY

SHERRY L. MADISON
20280 North 59th Avenue, Ste. 115-217
Glendale, Arizona 85308

Phone: 602-741-0891

In Propria Persona

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

In the Matter of:

SHERRY L. MADISON,

Plaintiff,

VS.

**First Magnus Financial Corporation, Et.
Al.**

Defendants.

Case No.:

CV'08 01562 PHX DKD

CIVIL ACTION

**NOTICE OF LIS PENDENS
PURSUANT TO A.R.S. 12-1191 (A)**

(QUIET TITLE)

TO WHOM IT MAY CONCERN:

Pursuant to A.R.S. 12-1191 (A) and applicable Federal Statutes, Notice is hereby given of the commencement and pendency of the above-entitled Civil Action, general objects of which are (1) the enforcement of Plaintiff Sherry L. Madison's rights with regard to the property located at 16083 West Morning Glory Street, Glendale, Arizona 85338. Legally described as Lot 499, Wildflower Ranch Unit IV, According to Book 447 of Maps, Page 16, Records of Maricopa County Arizona.

(2) TRANSFER OF TITLE TO THAT PROPERTY TO Plaintiff, Sherry L. Madison; (3) as a direct and proximate cause of the Defendants' violation of Arizona

1 State and Federal Laws and with regard to the property in favor of Plaintiff, Sherryl
2 Madison.

3
4 DATED this 25th day of August 2008.

5
6 *Sherryl Madison, without Reentry/*
7 Sherryl Madison ucc1-308 *prejudice*
8 Petitioner, In Propria Persona

9
10
11 I hereby attest and certify on 5/11/09
12 that the foregoing document is a full, true and correct
13 copy of the original on file in my office and in my cus-
14 tody.

15 CLERK, U.S. DISTRICT COURT
16 DISTRICT OF ARIZONA
17 by *[Signature]* Deputy
18
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OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL

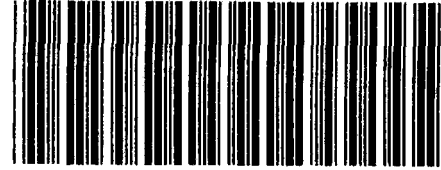


The foregoing instrument is
a full, true and correct
copy of the original record
in this office.

Attest: 07/20/2009 05:56:19 PM

By *Helen Purcell* Recorder

Exhibit “C”



RECORDING REQUESTED BY
SHERRYL MADISON
AND WHEN RECORDED MAIL TO:

Taj Madison-Nelson
24220 N. 53RD AVE
GLENDALE, AZ 85310

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2008-0616382 07/15/08 11:05 AM
1 OF 6

MIRAFONTESA

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QUIT CLAIM DEED

THE GRANTOR(S) SHERRYL MADISON FOR AND IN CONSIDERATION OF \$10.00 - TEN DOLLARS CONVEY AND QUIT CLAIM TO THE GRANTEE(S) TAJUDDIN GITHIAGA MADISON-NELSON THE FOLLOWING DESCRIBED REAL ESTATE, SITUATED IN THE COUNTY OF MARICOPA, STATE OF ARIZONA TOGETHER WITH ALL AFTER ACQUIRED TITLE OF THE GRANTOR(S) THEREIN (LEGAL DESCRIPTION): LOT 499, WILDFLOWER RANCH UNIT IV, ACCORDING TO BOOK 447 OF MAPS, PAGE 16, RECORDS OF MARICOPA COUNTY, ARIZONA.

DATED

7/15/08

GRANTOR/Sherryl Madison

State of Arizona

County of Maricopa

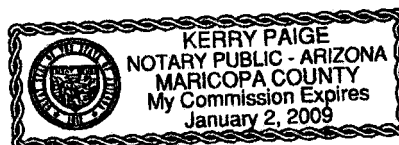
EXEMPT PER ARS 11-1134 B3

On this day personally appeared before me Sherryl Madison
Grantor(s), to me known to be the individual(s) described in his/her/their free and voluntary act
and deed for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 15 day of JULY, 20 08.

Kerry Paige
NOTARY PUBLIC in and for the State of Arizona

RESIDING AT WELLS FARGO BANK, MY COMMISSION EXPIRES: JAN 2 2009



20080616382
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL



The foregoing instrument is
a full, true and correct
copy of the original record
in this office.

Attest: 07/20/2009 05:56:19 PM

By *Helen Purcell* Recorder

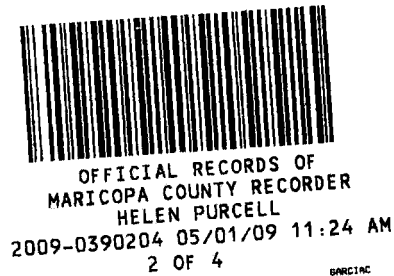
Exhibit “D”

AND WHEN RECORDED MAIL TO:

PINK DIAMOND TRUST
C/O 443 ELLIS ST.
[13210] SYRACUSE
NEW YORK, DEJURE U.S.A.

LOAN # 1000142928

MIN # 1000285-1000142928-5



SPACE ABOVE THIS LINE FOR RECORDER'S USE
Pursuant to A.R.S. 11-1134 Exempt B3

STATE OF ARIZONA
COUNTY OF MARICOPA

**NOTICE OF SUBSTITUTION OF TRUSTEE AND
DEED OF RELEASE AND RECONVEYANCE**

WHEREAS, THE INDEBTEDNESS SECURED BY THE DEED OF TRUST EXECUTED BY SHERRYL L. MADISON, TRUSTOR, TO COMMUNITY LENDING, INCORPORATED, DATED 07/10/2007, AND RECORDED 07/11/2007, IN DOCKET 2007-0790510, PAGE 16 OF OFFICIAL RECORDS IN THE OFFICE OF THE COUNTY RECORDER OF MARICOPA COUNTY, STATE OF ARIZONA, HAS BEEN FULLY SATISFIED.

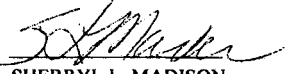
PROPERTY ADDRESS: 16083 W. MORNING GLORY ST, GOODYEAR, ARIZONA 85338 AP# 500-05-582 1


THE UNDERSIGNED BENEFICIARY HEREBY APPOINTS INDYMAC BANK, FSB IN ARIZONA WHOSE ADDRESS IS P.O. BOX 4045 KALAMAZOO, MI 49003 SUCCESSOR TRUSTEE UNDER THE ABOVE MENTIONED DEED OF TRUST.

NOW, THEREFORE THE TRUSTEE(S) UNDER THE SAID DEED OF TRUST DO(ES) HEREBY RELEASE AND RECONVEY, WITHOUT COVENANT OF WARRANTY EXPRESS OR IMPLIED, UNTO THE PARTIES LEGALLY ENTITLED THERETO ALL RIGHTS, TITLE AND INTEREST WHICH WAS HERETOFORE ACQUIRED BY SAID TRUSTEE(S) UNDER SAID DEED OF TRUST.

DATED ON 03/18/2009

INDYMAC BANK, F.S.B.
BENEFICIARY

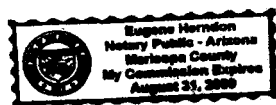
BY: 
SHERRYL L. MADISON
ATTORNEY IN FACT

BY: 
SHERRYL L. MADISON, ATTORNEY IN FACT
INDYMAC BANK, F.S.B.

State of ARIZONA
County of MARICOPA

} SS

This instrument was acknowledged before me this 18TH day in March, 2009 by SHERRYL L. MADISON.



Notary Public

My commission will expire 8/31/09

20090390204
OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL



The foregoing instrument is
a full, true and correct
copy of the original record
in this office.

Attest: 07/20/2009 05:56:19 PM

By  Recorder